

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
20365-s40A BY G. W. MARSTAELLER)
* * * * *

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on April 22, 1981, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

Application for Beneficial Water Use Permit No. 20365-s40A by G. W. Marstaeller is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 19th day of June, 1981.

David L. Pengelly
David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation

AFFIDAVIT OF SERVICE
(Proposed Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Margaret Schueneman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on April 30, 1981, he deposited in the United States mail, "certified mail, return receipt requested," a copy of the Proposed Order by the Department Hearing Examiner on the application by G. W. Marstaeller, Application No. _____, for a permit to appropriate water, addressed to each of the following persons or agencies:

* Application Nos. 20365, 20366, 27401, 17907 and 27402
Certified Nos. 51816 to 51819

18. Henry J. DeCock, Shawmut, Mt., 59078
19. Joseph DeCock, P.O. Box 245, Melville, Mt., 59055
20. Don Riddle, Field Manager, DNRC, 1245 N. 29th St., Billings, Mt. 59101
(~~regular mail~~)
1. Larry Brown, Hydrologist, DNRC, Helena, Mt., 59601 (hand deliver)
22. David L. Pengelly, Hearing Examiner, DNRC, P.O. Box 5004, Missoula, 59801
(regular mail)
23. Cooney Brothers, Harlowton, Mt., 59036

SEE 17907 for CRRR CARDS

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Margaret Schumann

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this 30th day of April, 1981, before me, a Notary Public in and for said State, personally appeared Margaret Schueneman, known to me to be the Secretary, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

CASE # 20365

Notary Public for the State of Montana

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
20365-s40A BY G. W. MARSTAELLER)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 13, 1980, at Harlowton, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 20365-s40A, David Pengelly, Hearing Examiner, presiding. The hearing in the above matter was held simultaneously with the hearings in the Matters of Application Nos. 17907, 20366, 27401, and 27402, all by Mr. G. W. Marstaeller.

The Applicant, Mr. G. W. Marstaeller, appeared at the hearing and presented testimony in support of the Application. Mr. Marstaeller was represented by legal counsel, Mssrs. Perry Moore and David Moon, Bozeman, Montana. Eight (8) exhibits were introduced in support of the Application, to wit:

Applicant's Exhibits:

- (A-1) Summary of Water Rights claimed by the Applicant.
- (A-2) Copy of Abstract of Deed for Applicant's land.
- (A-3) Certified copy of Fish Creek Decree - Summary of Decreed Rights.
- (A-4) Certified copy of Complaint filed by Blanche Martin regarding the Fish Creek Decree.
- (A-5) Certified copy of Answer by Judy A. McClatchney for Robert McClatchney regarding the Fish Creek Decree.

(A-6) Certified copy of Filed Appropriation by Albert Crest for 200 inches of water from Tony Creek, filed October 15, 1891.

(A-7) Certified copy of Filed Appropriation by Albert Crest for 150 inches of water from Spring Creek filed in September, 1886.

(A-8) Certified copy of Filed Appropriation by Sivert M. Brack for 150 inches of water from the West Fork of Puett Creek, filed on August 22, 1909.

Applicant's Exhibit A-1 was introduced into the record with an objection filed by Mr. William Mather as to the validity and self-serving nature of the Exhibit. Exhibits A-2 through A-8 were introduced into the record with no objections.

Nine (9) of the ten (10) objectors to the above Application were present and/or represented at the hearing. Those objectors present at the hearing were: Joseph DeCock, Henry DeCock, Golden Valley Colony by Jacob Kleinsasser, Cherry Creek Cattle Company by Edgar M. Adams, Hauge Brothers, John A. and Alice M. Adams, Darla Cavill Jeffers, Fish Creek Ranch by Morlee Van der Vort, and James and Kathleen Ott. John A. and Alice M. Adams and the Cherry Creek Cattle Company were represented by counsel Thomas M. Kelly, Billings, Montana. Objectors Golden Valley Colony, Fish Creek Ranch, James and Kathleen Ott, and Darla Cavill Jeffers, were represented by Counsel William S. Mather, Billings, Montana. Objector Mary J. Titeca was not present at the hearing. Fourteen (14) exhibits were introduced by the Objectors at the hearing, to wit:

Objectors' Exhibits:

- (0-1) (John Adams) Certified copies of all recorded water rights on Tony Creek (10 pages).
- (0-2) (John Adams) Summary of Water Rights on Tony Creek.
- (0-3) (Edgar Adams) Copy of Mortgage from Robert Enders and wife to John L. Blakey.
- (0-4) (Edgar Adams) Contract No. 1750, Receivers Deed No. 1350, from Andrew F. Burley (receiver of the Northern Pacific Railroad Company) to Robert Andrew.
- (0-5) (DeCock) Copy of engineer's report and Decree for Water Right claimed by DeCock with a September 20, 1910, priority date from Tony Creek.
- (0-6) (DeCock) Copy of Notice of Appropriation filed by Leon J. Cross for 200 inches of water from Tony Creek with a priority date of September 20, 1910.
- (0-7) (DeCock) Copy of platt showing ditch and land irrigated by Leon J. Cross.
- (0-8) (DeCock) Photo of tractor in bed of Fish Creek in August of 1961.
- (0-9) (DeCock) Photo of Truck in bed of Fish Creek in August of 1961.
- (0-11) (Golden Valley Colony) Copy of map of Objector's property and copies of water rights claimed.
- (0-12) (Fish Creek Ranch) Copies of three (3) maps of Objector's irrigated lands and notices of Appropriations claimed by Fish Creek Ranch; one filed by a Mr. Powell for 200 inches from Fish Creek on November 18, 1905, and the second filed by the Van der Vorts for 30 cubic feet per second on May 10, 1973.

(O-14) (James Ott) Map of lands irrigated and copies of Water Right Notice of Appropriation for 300 inches of water from Fish Creek filed by Jeanette Jenizen on the 18th day of November, 1905; and a Notice of Appropriation filed by William F. Hale for 200 inches of water from Fish Creek on November 18, 1905.

(O-15) (Darla Cavill Jeffers) Copy of Notice of Appropriation to Lester T. Cavel for 1.35 cubic feet per second from Fish Creek on June 20, 1910.

(O-16) (Darla Cavill Jeffers) Copy of Notice of Appropriation filed by Robert O. McPhee for 500 inches of water from Fish Creek on April 1, 1896.

All of the above exhibits were introduced into the record with no objections, although counsel for the Applicant reserved the right to challenge some of the rights claimed in the exhibits at a later date.

Three (3) witnesses testified in support of the Application: Mr. Frank L. Biglen, an engineer with the Soil Conservation Service in Big Timber; Mr. Merlin N. Nelson, an engineer with the Soil Conservation Service in Laurel, Montana; and Mr. Ed Juwan, a ground water specialist with the Soil Conservation Service in Bozeman, Montana.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Mr. Don Riddle, New Appropriations specialist with the Billings Area Water Rights Bureau Office; and Ms. Gale Greer, Hearing Reporter. Also present at the hearing and testifying on behalf of the Department was Mr. Larry Brown, formerly a hydrologist with the Department of Natural Resources and Conservation, and at the time of the

hearing a hydrologist with the Montana Department of Health and Environmental Sciences. The Department was not represented by legal counsel; no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On June 5, 1978, the Department received Application for Beneficial Water Use Permit No. 20365 s40A by G. W. Marsteller, to appropriate 2.7 cubic feet per second or 1200 gallons per minute of water and not to exceed 342 acre-feet per annum from Tony Creek (Pruett Creek) a tributary of Fish Creek in Sweetgrass County, Montana. The water is to be diverted from Tony Creek (Pruett Creek) by means of a pump at points in the NE1/4 NW1/4 SW1/4 and SE1/4 NE1/4 NE1/4 of Section 16, Township 5 North, Range 16 East, M.P.M., and used for new sprinkler irrigation on a total of 171 acres, more or less, in said Section 16, from April 15 to October 15, inclusive of each year.

2. On January 17, 24, and 31, 1979, the Department caused to be duly published in the Big Timber Pioneer, Notice of Application for Beneficial Water Use Permit No. 17907 s40A.

3. On January 22, 1978, the Department received an objection to the above Application from John A. and Alice M. Adams.

4. On February 5, 1979, the Department received an Objection to the above Application from Mary J. Titeca.

5. On February 13, 1979, the Department received Objections on the above Application from Joseph DeCock, and Henry DeCock.

6. On February 16, 1979, the Department received an objection to the above Application from the Golden Valley Colony.

7. On February 26, 1979, the Department received an Objection to the above Application from the Cherry Creek Cattle Company filed by Edgar M. Adams.

8. On February 27, 1979, the Department received an Objection to the above Application from the Hauge Brothers.

9. On February 7, 1980, a PreHearing Conference on the above Application was held in Big Timber, Montana. At the time of the PreHearing Conference the following persons were admitted as untimely objectors to the above Application: Darla Cavill Jeffers, Fish Creek Ranch (Morlee Van der Vort), and James and Kathleen Ott. At the PreHearing Conference, at the request of the Applicant, the above Application was held until Applications for Change of Appropriation Water Right could be filed by the Applicant. It was agreed that the hearing on the above Application would be held concurrently with the Hearing on the Change Applications once they were published and the expected objections received.

10. The hearing on the above Application was held on November 13, 1980, in Harlowton, Montana.

11. At the request of the Counsel for the Applicant, briefs in the above matter were submitted to the Hearing Examiner. The initial briefs were to be filed by December 12, 1980, with reply briefs to be filed by the Counsels for the Objectors in the above matter within 15 days after service of the Applicant's brief.

PROPOSED FINDINGS OF FACT

Based on information contained in the Department's file and the transcript from the hearing in this matter, it is found that:

1. That the source of supply in the above Application is Tony Creek which is a tributary of Fish Creek in Sweet Grass County, Montana.

2. That the Application is for 1,200 gallons per minute up to 342 acre-feet per year to be diverted from Tony Creek from April 15 to October 15 inclusive, of each year, for sprinkler irrigation of 171 acres in Section 16, Township 5 North, Range 16 East, M.P.M.

3. That only 93 1/2 acres of the above mentioned lands are listed on the map of irrigable acres presented by the Applicant at the hearing, and these acres are located in the NW1/4 of Section 16.

4. That the Applicant proposes to divert water from Tony Creek from two points of diversions located in the NE1/4 NW1/4 SW1/4 of Section 16 and the SE1/4 NE1/4 NE1/4 of Section 16.

5. That the Applicant originally applied for two (2) acre-feet of water per acre of land.

6. That at the hearing the Applicant testified that he owned up to 402 irrigable acres which could be irrigated partially using water obtained under this Application. An examination of the map of irrigable acres presented at the hearing shows that there were actually 422 irrigable acres outlined on the map.

7. That unappropriated waters in Tony Creek are generally available only during the spring runoff which generally ends in early June.

8. That the climatic regime for this area could be termed a semi-drought condition.

9. That during a normal semi-drought year only 430 acre-feet of water would be available above the proposed points of diversions and that only 50 percent or 215 acre-feet of water would be available during spring runoff.

10. That the Applicant intends to grow mostly hay with some grain using waters obtained under this Application.

11. That the soils of the lands proposed to be irrigated are mostly clay-loam and will support a good crop.

12. That Tony Creek has dried up completely in some years, for example 1961, 1962 and 1974.

13. That Tony Creek is also known as Pruett Creek, Andrews Creek, and South Fork of Fish Creek.

14. That Objector John Adams has a filed appropriation for 200 miners inches for irrigation purposes and claims a use right for watering 400 to 500 head of cattle from Tony Creek.

15. That Objector Edgar Adams waters approximately 300 head of livestock from Tony Creek from October through May and claims that a high flow in Tony Creek during these winter months is necessary to keep the stream free from ice.

16. That Objector Joe DeCock flood irrigates approximately 100 acres from Tony Creek.

17. That a Mr. Jim Hansen irrigates approximately 80 to 100 acres from Tony Creek. Mr. Hansen was not an objector to this Application.

18. That the Golden Valley Colony sprinkle irrigates approximately 115 acres from Fish Creek and waters approximately 350 cow/calf pairs and 550 ewes from Fish Creek.

19. That the Fish Creek Ranch irrigates approximately 180 acres by both flood and sprinkler systems from Fish Creek.

20. That a Mr. Ray Drake owns approximately 40 acres which are irrigated under lease by Mr. Morlee Van der Vort, an Objector to the above application. Those acres are irrigated from Fish Creek.

21. That Objector James Ott is the last point of diversion on Fish Creek before it joins the Musselshell River and he irrigates approximately 60 acres from Fish Creek.

22. That Objector Darla Cavill Jeffers irrigates approximately 200 acres from Fish Creek.

23. That the water available for this application is also the same water that would be available for Application No. 17,907 and that if 150 acre-feet of water are diverted pursuant to Application No. 17,907, then in a normal year only 65 acre-feet of water would be available in the entire drainage above the Applicant's proposed point of diversion for irrigation purposes and also to satisfy the needs of downstream appropriators.

PROPOSED CONCLUSTIONS OF LAW

1. Section 85-2-311, MCA, 1979, states in part that "the Department shall issue a Permit if:

(1) There are unappropriated waters in the source of supply:

a. At times when the water can be put to the use proposed by the Applicant;

b. In the amount the Applicant seeks to appropriate; and

c. Throughout the period during which the Applicant seeks to appropriate, the amount requested is available;

(2) The rights of a prior appropriator will not be adversely affected;

(3) The proposed means of diversion or construction are adequate;

(4) The proposed use of water is a beneficial use;

(5) The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; . . ."

2. Section 85-2-312(1) MCA, 1979, states in part that "The Department may issue a permit for less than the amount of water requested. . . The Department may require a modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators . . ."

3. It is concluded that there are not sufficient unappropriated waters in the source of supply at times when the water could be put to the use proposed by the Applicant and also to the use proposed by the Applicant under Application No. 17907.

4. It is concluded that there are not unappropriated waters available in the source of supply throughout the period during which the Applicant seeks to appropriate water.

5. It is concluded that there are not unappropriated waters available in the amount the Applicant seeks to appropriate said waters.

6. It is concluded that the proposed use of water would adversely affect downstream appropriators.

7. It is concluded that the proposed means of diversion or construction are adequate.

8. It is concluded that the proposed use of water is a beneficial use.

9. It is concluded that the proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

10. Nothing decided herein has a bearing on the status of water rights claimed by the Applicant other than those herein applied for, nor does anything decided herein have bearing on the status of claimed rights of any other party except in relation to those herein applied for, to the extent necessary to reach a conclusion herein.

PROPOSED ORDER

1. Application for Beneficial Water Permit No. 20365 by G. W. Marstaeller is hereby denied.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by Certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a

petition in the appropriate court within thirty (30) days after
service of the Final Order.

DATED this 22nd day of April, 1981.
David L. Pengelly
Hearings Examiner

David L. Pengelly